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ABSTRACT

The application of small group interaction and decision making assessment methods has demonstrated many of the interpersonal preferences, understandings, and attitudes of the Supreme Court. Six terms of the Supreme Court, from October 1969 through October 1974 were chosen for evaluation. Only those cases in which the formal opinion of the Court was authored by one of its members were considered. Matrices were constructed to show interagreement in differing circumstances. Type and degree of dissent, coalition formation, the effect of personnel change, and value systems as measured by the Guttman scale were investigated during this time period. Although the study of decision making by the Supreme Court is inexact, the information contained here should provide insight for those who practice before the Court. (KS)

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THE SUPREME COURT AS A SMALL GROUP

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THE SUPREME COURT AS A SMALL GROUP

The study of communication in judicial settings has been primarily limited to analysis of the jury and its decision-making. Attention has been focused on the jury to the almost complete exclusion of another member of the courtroom, the judge. This paper is designed to investigate the Justices of the United States Supreme Court, sitting as a continuous group, through the application of small group analysis.

Every major work applying small group techniques to the judicial setting has occurred outside the field of speech communication. The precedent-setting work has been C. Herman Pritchett's The Roosevelt Court.[1] He demonstrated the continuous patterns of agreement and dissent among the Justices over a twenty year period. As a method of ordering his information, Pritchett constructed matrices of the percentages of agreement between each pair of Justices. He referred to these matrices as tables, but they are extensions of the cluster-bloc analysis developed by Herman Beyle.[2] Pritchett, however, concentrated on the political impact of the Court decisions.

Glendon Schubert followed Pritchett's bloc methods and attempted to determine the interpersonal structure

of the Supreme Court during the Vinson Court and the first five terms of the Warren Court. Schubert constructed four matrices to record decisions: dissenting blocs, dissenting blocs in marginal cases, participation in the majority in split decisions, and interagreement in split decisions.[3] Schubert's orientation was in law and political science.

Probably the major advocate of the small group approach to judicial decision-making is Walter Murphy. Beginning his 1960 article, Murphy wrote: "Reliable theories and perhaps even raw data about human behavior in small groups may thus be relevant to the study of the judicial process."[4] The history of small group analysis of judicial decision-making was then recounted briefly by Murphy before he recommended increased research in the area:

> Although it may not have any immediate use in winning a particular lawsuit, small group analysis has already done much to increase understanding, by social scientists as well as lawyers, of the judicial process; and the various approaches have not yet been fully exploited.[5]

To differ slightly with Murphy, such small group analysis might well assist counsel. The judicial process is a system much like the communication process. Thomas Jahnige isolated two of the elements that characterize the system: inputs and conversion.[6] The inputs in this system are the litigation which face the Justices, the communication directed toward them. The second stage, conversion,

occurs "as the inputs are processed, shaped, and evaluated by the Court."[7]

An understanding of the conversion is instrumental to the attorney as a communicator. If the advocate appearing before the Court understands which Justices are likely to oppose the message, and which Justices are likely to respond favorably to certain issues, then the chances for success should be improved.

Procedures for Study

For the purposes of this paper six terms of the Supreme Court, from October, 1969, through October, 1974, were chosen for study. The first requirement was to define the universe of cases to be considered. Only those cases in which the formal opinion of the Court was authored by one of its members were considered, thus per curiam decisions have been eliminated from the universe.

Matrices were constructed to show interagreement in differing circumstances. Combined interagreement, along with joint participation in the majority and in dissent were recorded. To determine the intensity of the correlations, both phi and phi/max correlation coefficients were utilized on the preliminary totals. Chi-square measured the degree to which differences between Justices were larger than those expected by chance.

Cohesion on the Court

The level of dissent on the Court denotes the internal cohesiveness of that body. During the era of Oliver Wendell Holmes and Louis Brandeis dissents occured but one in five times. In the post-war period the level grew to a rate consistently above one-half of the cases, nearly sixty percent during the Warren Court.[8]

During the 1969 term of the Court the level of dissent rivaled that of the Warren Court, over 63 percent of the cases decided by a split decision. For the 1970 term, the total dissent rate was 65 percent but reduced to 59 percent for 1971. During the fourth term of study the total dissent rose to 66 percent, it approached 70 percent for the fifth year, but fell to 57 percent for the final term. From this information it appeared that there existed only a low level of cohesion on the Court during these six years.

On the other hand, the pattern of dissent on the Court did demonstrate the effects of some group pressure. Solomon Asch tested the effect of opposition on the distortion of an individual's judgment. As an individual received support from members of the group his tendency to dissent from the majority judgment increased.[9] The same was true of the Supreme Court. Dissents by a single member of the Court were far less common than dissents by

any other number of Justices. Divided as it was, the Court still exerted pressure on the individual Justice to modify his opinion.

Coalitions on the Court

Two coalitions were visible during each term, each maintaining a great deal of stability. Justices Brennan, Douglas and Marshall voted together on an average 72 percent of the time during the six years, with a low of 69 percent and a high of 76 percent. The second bloc centered around the Chief Justice. Justices Harlan, Blackmun, Powell and Rehnquist were all solid members of the coalition during their terms on the Court. Their joint voting behavior ranged from 72 percent to 82 percent.

Whether bloc formations are typical of similar sized groups has not been established in previous small group research. A tendency in this direction was noted by Leon Festinger while examining interpersonal choices in a housing development.[10] The present study provides an element of confirmation.

Personnel Change on the Court

Research on the consequences of group personnel change has generally been related to group psychotherapy. The loss or addition of a new member to a theraputic group significantly impacts that group.[11] The effect of personnel change may not be as obvious as in non-

theraputic group settings but the disruption might have equal potential over group influence. Any group's organization is maximally structured when it minimizes the results of membership turnover.

Like other groups, the Supreme Court has established rules granting certain powers to senior members. The manner in which the Justices sit when oral argument is heard, the order in which they give views during the Saturday conferences, the order in which they vote, all are dictated by seniority of group membership. Whether by design or not, the rules function to minimize the negative impact concomitant with personnel change. The rules force the new Justice to recognize his position.

During the period of study four Justices left the Court, their positions filled by appointment. This change provided an opportunity to test a hypothesis offered by John Sprague: "The new member's association scores will tend to be distributed equally among all other members."[12] In other words, the difference between the newcomer's lowest interagreement and his highest would be less than that for the average member of the Court. The previously constructed matrices were used.

This study does not validate the hypothesis. The range of interagreement scores for the freshman Justices was much above the Court average. At the same time this initial extremity of association scores showed a marked decline with experience on the Court.

The study answered a second question. Schubert had asked: "Do freshman justices dissent more or less frequently than other members of the Court?"[13] In every case but one, the new Justice was found to dissent more frequently during his first term and less often in ensuing years. It would appear from this, as with the previous finding, that the new Justice does not immediately blend into the Court.

Values on the Court

"At times," wrote Benjamin Cardozo, "the Justice must put himself as best he can within the heart and mind of others, and from his estimate of values by the truth revealed. Objective tests may fail him, or may be so confused as to bewilder. He must then look within himself."[14] The values of the Justices are vitally important in the decision-making process and may explain the formation of blocs within the Court, especially if the Justices are found to have common attitudes and values on issues brought before them.

One method of measuring attitudes, applicable to judicial decision-making, was developed by Louis Guttman. A Guttman scale, or cumulative scale, postulates that a person who responds favorably to the third item on a scale is likely to have also been favorable to the first and second.[15]

A Guttman scale was applied to the decisions of the Supreme Court to determine if the Justices could be ordered according to their attitudes. The cases presented to Justices can be considered similar to the items presented to individuals on questionnaires, only the Justices respond to the questions or stimuli by their votes.

The cases before the Court were divided according to the issues raised. Seven issues were found where more than ten cases were included; these were the only cases considered in the analysis. The issues involved self-incrimination, search and seizure, the Fourteenth Amendment, administrative regulations in the armed forces and welfare and anti-trust enforcement.

The cumulative scale involved a ranking of both the cases and Justices. A ranking of the cases was completed by first recording the votes of the Justices as positive or negative in relation to the issue under consideration. Those cases were then ranked in order of the number of positive votes cast, ranging from 8 - 1 to 1 - 8.

Justices were aligned according to the consistency of their voting position on the issue. By consistent it was meant that, previous to the case a majority of the Justice's votes were positive or negative. Consequently, Justices that have approximately the same attitude on an issue will be placed near to each other on the scale.

In all the areas of content, except one, the Court voted in such a manner that its decisions represented consistent attitudes on the part of the Justices. It was also evident that the voting blocs identified were at least partially explainable by the attitudes of the Justices toward the issues. On every one of the issues, Brennan, Marshall and Douglas were found to have similar attitudes. The other bloc was equally apparent.

Summary

The study of decision-making on the Supreme Court is complicated and inexact. The inability to venture beyond the curtain that separates the private discussions of the Court from public view necessitates piece-meal research. Much of the information can only raise further questions that cannot be answered without observing the Court in action and questioning the participants.

The information supplied by study of the Court should provide insight to those who must argue there. The application of small group methods has demonstrated many of the interpersonal preferences, understandings and attitudes of the Supreme Court.

FOOTNOTES

[1]C. Herman Pritchett, The Roosevelt Court (New York: MacMillan, 1948).

[2]Herman C. Beyle, Identification and Analysis of Attribute-Cluster Blocs (Chicago: Univ. of Chicago Press, 1921).

[3]Glendon Schubert, Quantitative Analysis of Judicial Behavior (Glencoe: The Free Press,1959).

[4]Walter Murphy, "Courts as Small Groups," Harvard Law Review, 79, (June 1966), 1565.

[5]Murphy,1551.

[6]Thomas Jahnige, ed., The Federal Judicial System (New York: Holt, Rinehart and Winston, 1968).

[7]Jahnige,p. 5.

[8]Percival Jackson, Dissent in the Supreme Court (Norman: Oklahoma Press, 1969), pp. 18-19.

[9]Solomon Asch, "Effects of Group Pressure Upon the Modification and Distortion of Judgments," in Groups, Leadership and Men, ed. Harold Guetzkow (Pittsburgh: Carnegie Press, 1951), pp. 177-190.

[10]Leon Festinger, et al, Social Forces in Informal Groups (New York: Harper, 1950), p. 95.

[11]Hugh Mullan and Max Rosenbuam, Group Psychotherapy (New York: The Free Press, 1962), p. 246.

[12]John D. Sprague, Voting Patterns of the United States Supreme Court (New York: Bobbs-Merrill, 1968), p. 136.

[13]Schubert, p. 19.

[14]Benjamin N. Cardozo, The Paradoxes of Legal Science (New York: Columbia Univ. Press, 1928), pp. 55-6.

[15]Louis Guttman, "A Basis for Scaling Qualitative Data," American Sociological Review, 9, (1944), 139-150.